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9th Administrative Review
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DATE: October 7, 2010

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the 2008/09 Antidumping
Duty Administrative Review of Certain Polyester Staple Fiber
from the Republic of Korea

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the 2008/09 administrative review of certain polyester staple fiber from the Republic of Korea. As a result of our analysis, we have made no changes to the preliminary results. We recommend that you approve the positions described in the “Discussion of Issues” section of this memorandum. Below is a complete list of the issues in this review for which we received comments and rebuttals from interested parties:

Comment 1: Offsetting Negative Margins

Comment 2: Quarterly Cost Methodology

BACKGROUND

On June 15, 2010, the Department of Commerce (“Department”) published, in the Federal Register, the preliminary results of the ninth administrative review of the antidumping duty order on certain polyester staple fiber (“PSF”) from the Republic of Korea.¹ The period of review (“POR”) is May 1, 2008, through April 30, 2009. On July 20, 2010, the Department released a post-preliminary analysis memo with our analysis of cost and price data submitted by Huvis

¹ Certain Polyester Staple Fiber from the Republic of Korea: Preliminary Results of the 2008 - 2009 Antidumping Duty Administrative Review, 75 FR 33783 (June 15, 2010) (“Preliminary Results”).

Corporation (“Huvis”).² The Department preliminarily determined that application of the Department’s quarterly costing methodology is not warranted. As a result, there was no recommended change to the findings in the Preliminary Results. We invited interested parties to comment on the Preliminary Results and the Post-Prelim Memo.

On July 15, 2010, we received a case brief from Huvis concerning the Preliminary Results. On July 26, 2010, we received case briefs from DAK Americas, LLC and Invista, S.a.r.L., (collectively, “Petitioners”) and Huvis concerning the Post-Prelim Memo. On August 2, 2010, the Department received a rebuttal brief from Huvis. A public hearing was not requested.

DISCUSSION OF ISSUES

Comment 1: Offsetting Negative Margins

Huvis’s Argument: Huvis insists the Department should eliminate the practice of “zeroing” out negative antidumping margins that occurred when Huvis’s U.S. price exceeded the company’s normal value. Huvis asserts that the Department should include negative antidumping margins in the total margin calculations. It argues this would be consistent with the World Trade Organization (“WTO”) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“the AD Agreement”).

In response to the WTO decisions, Huvis states the Department decided to eliminate zeroing in margin calculations for original investigations where the average-to-average comparison methodology is employed. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (“Zeroing Notice”). Huvis claims that elimination of zeroing in administrative reviews is also necessary to comply with the clear and consistent line of decisions of the WTO Appellate Body that zeroing in virtually any context, including administrative reviews, contravenes the international obligations of the United States under the AD Agreement.

Huvis asserts that these WTO Appellate Body decisions encompass cases such as United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 23, 2007) (“US-Zeroing (Japan)”), where the ruling was that zeroing is not permitted when the average-to-transaction comparison methodology is employed. This ruling was re-affirmed by the WTO Appellate Body in its decision in the context of Japan’s recourse to Article 21.5. See Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan, WT/DS322/AB/RW (August 18, 2009).

Also, Huvis contends that the WTO Appellate Body’s decision in United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (April 30, 2008) (“US-Zeroing (Mexico)”), could not have been more explicit regarding the WTO Appellate Body’s consistent determination that zeroing is impermissible in administrative reviews:

² 2008-2009 Administrative Review of the Antidumping Duty Order on Certain Polyester Staple Fiber from the Republic of Korea: Post-Preliminary Analysis Calculation Memorandum for Huvis Corporation (dated July 6, 2010) (“Post-Prelim Memo”).

We fail to see a textual or contextual basis in the GATT 1994 or the Anti-Dumping Agreement for treating transactions that occur above normal value as “dumped” for purposes of determining the existence and magnitude of dumping in the original investigation and as “non-dumped” for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. {¶ 107}

Huvis contends that the WTO Appellate Body’s decision in US-Zeroing (Mexico) made clear that the WTO Appellate Body considered the previous analyses and determinations of the Appellate Body to be definitive and binding on WTO members. See US-Zeroing (Japan) and United States – Laws, Regulations And Methodology For Calculating Dumping Margins (EU), WT/DS294/AB/R (May 9, 2006), which struck down the U.S. practice of zeroing in administrative reviews.

Huvis contends that the WTO Appellate Body has also made clear in the course of hearing recent challenges to the implementation by the United States of these previous adverse rulings that it considers the previous rulings to be definitive and to extend to all liquidations that occurred, or will occur, pursuant to importer-specific assessments that were calculated in administrative reviews using the zeroing methodology.³ For example, Huvis explains, the WTO Appellate Body found that the United States acted inconsistently with the AD Agreement Article 9.3 and GATT Article VI:2 by using the “simple zeroing” methodology in the sixteen administrative reviews at issue.⁴

Huvis recognizes that the Department is not obligated to change its practice by implementing the WTO decisions described above in this administrative review. However, Huvis argues, while the statute requires certain procedural steps in order for the Department to modify its practice “in the implementation of” a specific WTO Appellate Body decision, Section 123(g)(1) of the Uruguay Round Agreements Act (“URAA”), 19 U.S.C. § 3533(g)(1), this does not prevent the Department from modifying a general practice on its own initiative. Huvis argues that it would be irrational to interpret Section 123(g)(1) as precluding the Department from voluntarily changing for good and compelling reasons a practice that is required by neither statute nor regulation simply because a WTO panel or the WTO Appellate Body has ruled in another case that the same practice is inconsistent with the AD Agreement. Huvis argues that changing the Department’s margin calculation practice in administrative reviews to make it compatible with the AD Agreement would be the proper interpretation of existing U.S. laws, which have always allowed for the possibility that antidumping margins can and should be calculated using a method that incorporates in their entirety the export prices for non-dumped sales.

Department’s Position: We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results of review.

Section 771(35)(A) of the Tariff Act of 1930, as amended (“the Act”), defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of

³ See Appellate Body Report, United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) – Recourse To Article 21.5 Of The DSU By The European Communities, WT/DS294/AB/RW ¶¶ 469(c)(i),(ii) (May 14, 2009), which rejected U.S. claims to the contrary.

⁴ *Id.* at ¶135.

the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Court of Appeals for the Federal Circuit ("CAFC") has held that this is a reasonable interpretation of the statute.⁵

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies this provision by aggregating all individual dumping margins, each of which is determined as the amount by which normal value exceeds export price or constructed export price, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which export price or constructed export price exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called "masked dumping" was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.⁶

The respondent has cited WTO dispute-settlement reports finding the denial of offsets by the United States to be inconsistent with the AD Agreement. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a report has been adopted pursuant to the specified statutory scheme" established in the URAA. See 19 U.S.C. §3538. See also Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1370; NSK, 510 F.3d

⁵ See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342-43 (Fed. Cir. 2004), cert. denied 543 U.S. 976 (2004) ("Timken"); Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1261 (CIT 2003) aff'd 395 F.3d 1343, 1347 (Fed. Cir. 2003), cert. denied, 126 S. Ct. 1023 (2006) ("Corus I"), 395 F.3d at 1347-49, and SKF v. United States, 537 F.3d 1373, 1381 (Fed. Cir. 2008) ("SKF").

⁶ See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1347; Corus Staal BV v. United States, 502 F.3d 1374-75 (Fed. Cir. 2007) ("Corus II"); and NSK Ltd. v. United States, 510 F.3d 1375, 1381 (Fed. Cir. 2007) ("NSK").

at 1379-80. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 U.S.C. §3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. §3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. §3533(g); see, e.g., Zeroing Notice at 77722-24. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

With respect to United States- Laws, Regulations and Methodology for Calculation Margins (Zeroing), WT/DS294/AB/R (April 18, 2006), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations.⁷ In doing so, the Department declined to adopt any other modifications concerning other methodology or type of proceeding, such as administrative reviews.⁸

With respect to US-Zeroing (Japan) and US-Zeroing (Mexico), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

Furthermore, in response to United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (December 13, 2003) ("US-Corrosion-Resistant Steel"), and European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001), the CAFC has refused to find the Department's interpretation of the Act unreasonable on the basis of these reports. See Corus I at 1348-49. As discussed above, the CAFC found that WTO reports are without effect under U.S. law until they are implemented pursuant to the statutory scheme provided in the URAA. Id. Additionally, the CAFC noted that, in US-Corrosion-Resistant Steel, the WTO Appellate Body never made a finding regarding the Department's denial of offsets.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

Comment 2: Quarterly Cost Methodology

Petitioners' Argument: Petitioners ask that, in this review, the Department follow its stated linkage policy for determining whether to apply the quarterly cost methodology with regard to Huvis. Petitioners assert the Department does not require linkage in every quarter, only "some

⁷ See Zeroing Notice.

⁸ Id. at 77724.

reasonable correlation” between the changes in costs and changes in prices.⁹ Petitioners aver the Department explained its policy further in SSSS Mexico, stating:

However, a perfect correlation between the sales and cost data will rarely exist, and thus, requiring such a correlation would preclude the Department’s use of quarterly costs even when the change in costs is significant. Instead, the Department prefers to rely on general price and cost trend analysis. See Turkish Rebar CIT Remand (states that there must be only some reasonable correlation).¹⁰ As it is the prices themselves that we are testing as to whether they are dumped or below cost, it is unrealistic to expect such prices to trend perfectly with cost changes throughout the year. In addition, the Department takes into account the presence of any pricing mechanism that permits the pass through of the change in costs to the buyers.¹¹

Petitioners believe that if the Department follows its stated policy on linkage that it would not only find that changes in the POR are significant,¹² but would also find that sales during the quarterly period could reasonably be linked with the quarterly cost of production data.

Huvis’s Argument and Rebuttal: Huvis agrees with the Department’s decision to not apply the quarterly cost methodology in this review. However, Huvis does not agree with the Department’s decision to apply its initial test to determine whether to deviate from the Department’s normal methodology of calculating an annual weighted-average cost. Huvis is concerned that the Department, after relying on the normal cost methodology for eight consecutive reviews, suddenly applied the quarterly cost test without notice or explanation. According to Huvis, this is in contrast to other administrative reviews where the Department explained its reasons for considering the use of alternative cost methodologies.¹³

In addition, Huvis does not agree with the particular methodology used to evaluate whether the change in cost of manufacturing (“COM”) was “significant.” Huvis takes issue with the Department focusing on whether costs for the primary raw material input changed significantly between any two quarters instead of the previous longstanding practice that the cost changes must be consistent throughout the entire POR.¹⁴ Huvis asserts the Department’s analysis to

⁹ See Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review, 75 FR 6627 (February 10, 2010) and accompanying Issues and Decision Memorandum, at Comment 6 (“SSSS Mexico”).

¹⁰ See Final Results of Redetermination Pursuant to Court Remand aff’d Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Slip Op. 09-133 (CIT November 23, 2009) (“Turkish Rebar CIT Remand”).

¹¹ Id., accompanying memo, p. 37.

¹² See Post-Prelim Memo, at Comment 2.

¹³ See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review, 67 FR 21634, 21636-67 (May 1, 2002) (“Turkish Rebar Prelim”); Unchanged in final results 67 FR 66110 (October 30, 2002).

¹⁴ See Carbon and Certain Alloy Steel Wire Rod from Canada; Final Results of Antidumping Duty Administrative Review, 71 FR 3822 (January 24, 2006); Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 71 FR 6269 (February 7, 2006).

determine the magnitude of cost changes by simply comparing the highest to lowest quarterly COM for each of the five largest CONNUMs sold in the U.S. and home markets is arguably distortive and does not support a conclusion that Huvis's COM changed significantly over the POR as a whole. Huvis believes the Department's calculation of cost changes are overstated because it uses a ratio of the COM difference.

Third, Huvis insists that the Department should make any major input adjustment to COM before it performs its analysis of the significance of any cost changes during the POR.¹⁵

Huvis takes issue with Petitioners' citation to SSSS Mexico, as the Department concluded there that there was "a reasonable basis for using our alternative cost methodology" relying on the respondent "having an alloy surcharge mechanism in place during the POR."¹⁶ Huvis had no such surcharge or pricing mechanism during the POR.¹⁷ Thus, Huvis asserts the Department's analysis and conclusions in SSSS Mexico are inapposite in this instance.

Huvis declares Petitioners' assertion that the Department looks for "a reasonable correlation" between changes in cost and prices rather than linkage in every quarter contradicts the record evidence and the Department's conclusion in the Post-Prelim Memo.¹⁸ In the Post-Prelim Memo, however, Huvis declares that the Department found "{f}or multiple CONNUMs in the home and U.S. markets... divergent price and cost trends throughout the POR."¹⁹ Huvis states the Department determined that for "all ten CONNUMs in their totality, we observed divergent price and cost trends... with no consistent companion trend of prices and costs" and properly concluded that, in this case, there was no evidence of linkage between cost changes and sales prices during the POR.²⁰

Huvis asserts its data do not show a reasonable correlation between the changes in costs and the changes in prices throughout the POR. Therefore, Huvis contends the Department should continue to rely on its normal methodology of calculating annual weighted-average costs for Huvis.

Department's Position: We continue to find that the application of the Department's quarterly cost-averaging methodology is not warranted for purposes of these final results. As such, we relied on our normal methodology of calculating annual weighted-average cost for purposes of the margin calculation. We did not make any changes to our calculations from the Preliminary Results.

We disagree with Huvis's assertion that the Department's decision to use its alternative cost averaging methodology in this case is not in accordance with past case precedents and that the

¹⁵ See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 FR 24885 (May 6, 2010). See also "Alternative Cost Averaging Period Analysis Memorandum – PT Pabrik Kertas Tjiwi Kimia Tbk., et al.," dated May 14, 2010 at 2.

¹⁶ See SSSS Mexico, and accompanying Issues and Decision Memorandum at Comment 6.

¹⁷ See Huvis's Supplemental Section D Questionnaire Response (May 28, 2010) at Comment 2.

¹⁸ See Huvis's August 2, 2010 Rebuttal Brief at PS 2.

¹⁹ See Post-Prelim Memo, at Comment 3.

²⁰ Id. at Comment 4.

Department has abruptly changed its established policy without explanation. We have applied the same standards to this case as we did in SSSS Mexico, Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 74 FR 31242 (June 30, 2009) (“Korean Pipe”), Turkish Rebar Prelim, and Turkish Rebar CIT Remand. The only difference between our past practice and the approach taken in recent decisions is that we more clearly defined the significance and linkage thresholds.

As for our methodology for measuring the change in COM, we use this methodology to measure the volatility of COM between quarters of the POR, regardless of whether the COM is trending consistently up, consistently down, or consistently up and down during the POR. In certain cases, even though the relative change in costs may not be significant, when comparing the costs at the beginning of the POR to those at the end of the POR, the change within the period may be significant.²¹ As such, the Department’s approach of dividing the difference between the highest and lowest average quarters’ COM by the lowest average quarter’s COM equally applies in periods where the costs are increasing, decreasing, or trending in both directions during the POR, because it measures volatility in costs between quarters irrespective of when the volatility occurs. In other words, the Department’s approach sets the same standard for measuring the significance of the change in the cost regardless of the direction(s) the costs are trending during the POR. The Department’s approach of dividing the difference in cost between the highest and lowest average quarters’ COM by the lowest average quarter’s COM for the POR results in a neutral, predictable, and reasonable way to measure the change in costs to determine if it meets the 25 percent threshold, irrespective of whether costs are increasing, decreasing, or trending in both directions during the POR.

Huvis argues that the Department should apply the major input rule before testing COM as part of the alternate methodology process. The point is moot because the application of the Department’s quarterly cost-averaging methodology is not warranted for purposes of these final results.

Although the record evidence shows that Huvis’s COM changed significantly during the POR (see Post-Prelim Memo), the record evidence does not show that Huvis’s sales prices during the shorter cost-averaging periods are reasonably linked with the COM during the same quarter. As we noted in the Post-Prelim Memo, for some CONNUMs, the record evidence shows sales price and costs move in opposition of each other. There are no consistent price and cost trends for the ten highest sales volume CONNUMs within the comparison market and U.S. markets. Additionally, as noted in the Post-Prelim Memo, in all comparisons, price changes were modest relative to the significant changes in costs throughout the POR. We observed divergent price and cost trends in our examination, with no consistent comparison trend of price and cost. Therefore, we have determined that linkage does not reasonably exist.

In response to Petitioners’ assertion that the Department does not require linkage in every quarter but rather only that a reasonable linkage exists between changes in costs and price, we point to the linkage analysis for Huvis (see Post-Prelim Memo). The record evidence shows divergent trends between sales prices and costs for the CONNUMs analyzed and there was no consistent companion trend of prices and costs. As such, we find that reasonable linkage does not exist.

²¹ See Korean Pipe and accompanying Issues and Decision Memorandum at Comment 1.

In a recent case cited by Petitioners, SSSS Mexico and the accompanying Issues and Decision Memorandum at Comment 6, the Department found reasonable linkage due to the fact that the respondents operated using an alloy surcharge mechanism. That is, they made sales with a provision that allowed them to pass on an increase in the cost of their main inputs to their customers. In this case, Huvis did not have such a surcharge mechanism to establish the final sales price. Therefore, because we cannot rely on a surcharge mechanism to establish linkage in this case, we have relied instead on our analysis of Huvis's sales price and underlying costs.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of this administrative review and the final weighted-average dumping margins for all firms reviewed in the Federal Register.

AGREE _____

DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date